

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

GOLDEN BETHUNE-HILL, et al. :
vs. : Civil Action No.
VIRGINIA STATE BOARD OF ELECTIONS, : 3:14cv852
et al. : September 22, 2017

COMPLETE TRANSCRIPT OF THE CONFERENCE CALL
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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1 the defendant intervenors, and pardon us if this is confusion
2 on the parties' part, but we had understood the Court's order
3 to read that motions *in limine* would be due this coming Monday.

4 THE COURT: Why would that be so, because they were
5 due so they would be ripe, that is fully briefed and completed
6 by the 25th which is Monday.

7 MS. McKNIGHT: Right, Your Honor. We were trying to
8 comply with the court order that noted that any motions *in*
9 *limine* would be due by Monday, the 25th.

10 THE COURT: Where does it say that? Maybe I'm
11 misreading it.

12 MS. McKNIGHT: Pardon me, Your Honor. I do not have
13 that order in front of me right now. I believe it was an order
14 dated July 13th.

15 THE COURT: Let me look.

16 MS. McKNIGHT: I'd ask plaintiffs' counsel or
17 defendants' counsel to step in if they had a different
18 understanding of the due date.

19 MR. HAMILTON: This is Mr. Hamilton. I don't know.
20 We don't intend to file any motions *in limine*, so I haven't
21 studied what the deadline is for the motions, so I apologize
22 for not having that.

23 THE COURT: I've got the order right here. It's
24 docket number 173, paragraph 13, page six. It says, "Motions
25 *in limine*, if any, shall be filed so that the briefing is

1 completed by September 25th and shall be considered at the
2 pretrial conference." So that briefing contemplates an opening
3 brief, a response brief, and a reply brief, and if you don't
4 file them until the 25th, you can't comply with paragraph 13.

5 MS. McKNIGHT: Your Honor, we may be able to cut this
6 conversation to the quick which is, you know, I just heard what
7 plaintiffs said, and, to be frank, the defendant intervenors do
8 not intend to file any motions *in limine* either. That was our
9 reading of the order, so that's why we included it, to make
10 sure it captured anything that would be filed, but it sounds
11 like no parties, as long as defendants agree, intend to file
12 any motions *in limine* on Monday.

13 MR. COX: This is Trevor Cox. Defendants also agree.
14 We have no motions *in limine* to file.

15 THE COURT: So there won't be any motions *in limine*
16 to be considered. All right. Now, are you all going to
17 propose, before the final pretrial conference, a schedule
18 for -- I don't know what item number one means, schedule for
19 trial considering final trial witness list. What does that
20 mean? Is somebody going to eliminate witnesses, or are the
21 lists of witnesses that we have now complete and you want to
22 know, taking into account those lives that we have now, how the
23 trial will proceed, or what do we want to address here?

24 MS. McKNIGHT: Yes, Your Honor. As I understood it,
25 defendant intervenors understood it, the latter which is final

1 trial witnesses have been filed, and I believe there may be
2 upwards of 17 witnesses. So I ask plaintiffs to correct my
3 understanding if they have a different understanding, and we
4 have three days set for trial. So we had not discussed filing
5 a proposed trial schedule, though if that's what the Court
6 would like, we can certainly do that.

7 THE COURT: It looks to me like, Mr. Hamilton, that
8 she's roughly correct about the number of witnesses, but I
9 haven't really counted them. You have filed how many?

10 MR. HAMILTON: Well, we have two experts, Your Honor,
11 and then several fact witnesses, I think five or six delegates
12 who are going to testify. The delegate testimony is going to
13 be relatively brief. I don't anticipate they will be very long
14 at all, and of the two experts. Jonathan Rodden from Stanford
15 will be the one who will be testifying for the longer part. So
16 the bulk of our case in chief is going to be two expert
17 witnesses and six very rapid-succession delegates.

18 THE COURT: Palmer and Rodden are the experts; right?

19 MR. HAMILTON: That's correct, Your Honor.

20 THE COURT: And then the other witnesses, one, two,
21 three, four, five, six are all delegates. Now, how long do you
22 anticipate the delegates' testimony to be each?

23 MR. HAMILTON: Probably from -- on the short end
24 20 minutes to, on the long end, 30, maybe 40. But that's
25 probably only Delegate McClellan. Several of these have never

1 testified before, but they're going -- the subject covered is
2 relatively discrete and will happen very quickly. Delegate
3 McClellan has already testified. We do not intend to have her,
4 or anyone else, repeat the testimony from the first trial other
5 than maybe to get a couple of quick highlights unless the Court
6 would like us to walk it through again for the benefit of the
7 new member of the panel that didn't hear the trial the first
8 time.

9 THE COURT: I'll raise that with the other judges,
10 and we'll deal with it at the final pretrial. How long do you
11 expect Palmer to be, and how long do you expect Rodden to be?

12 MR. HAMILTON: Palmer, we think probably about two
13 hours. The parties, again, Your Honor, like we did last time,
14 have stipulated to the admission of all of the expert reports,
15 and pursuant to the Court's order, those will be delivered to
16 chambers prior to the commencement of the trial. I don't have
17 the scheduling order in front of me, so I don't remember the
18 exact dates.

19 THE COURT: That's fine.

20 MR. HAMILTON: Because of that, the Court will have
21 had the opportunity to review the expert witness reports, and
22 I'm hoping that can help us streamline. I certainly don't want
23 to go through, in excruciating detail, the calculation of a
24 Reock or other factor that we're presenting in the expert
25 testimony, so we'll try to keep that relatively moving. But

1 Max Palmer, Professor Palmer, we expect to be about two hours.

2 THE COURT: How about Rodden?

3 MR. HAMILTON: Rodden we expect to last about three
4 including -- in both of those cases, that's including cross,
5 but, obviously, I don't control the time that intervenors spend
6 cross-examining these witnesses.

7 THE COURT: I understand. I'm just trying to get a
8 feel so we can talk about it further and decide a couple of
9 things.

10 Now, how about the defendants? Let me see. Your
11 witness list is -- just a minute here. Is document number 188.
12 You have, what, three experts it says? How long will Hofeller
13 be?

14 MR. BRADEN: This is Mark Braden. I would assume all
15 the expert witnesses, their direct testimony would be a half an
16 hour each.

17 THE COURT: All right. And you have seven -- well,
18 Morgan, is he testifying as a fact witness by virtue of the
19 work he did as a demographer?

20 MR. BRADEN: That is correct. He is the individual
21 who sat at the computer with Jones and actually drew
22 significant portions of the plan. So, yes, he's testifying as
23 a fact witness.

24 THE COURT: What about Loewen who testified in *West*
25 *against Gilmore*? You're just talking about --

1 MR. BRADEN: It is our assumption, and I think we're
2 very close, and the plaintiffs' counsel can inform me, but I
3 think that's going to be stipulated to. I would not anticipate
4 Dr. Loewen would be a witness in this case. I think his
5 testimony is going to be stipulated to where he authenticates
6 the report.

7 THE COURT: All right, and then Jones, how long do
8 you expect him to be?

9 MR. BRADEN: I would expect Jones to run two to three
10 hours, and I would expect Morgan to run two to three hours.

11 THE COURT: How about the others? You've got
12 Peace --

13 MR. BRADEN: Yes. I would expect that these -- much
14 like the other delegates, they have a fairly narrow window of
15 testimony on which they would be talking about. I would guess
16 that their direct testimony would be 15 to 20 minutes each.

17 THE COURT: For all of them -- for each one of them.

18 MR. BRADEN: Yes. I expect each one, we could do the
19 direct testimony in 15 to 20 minutes.

20 THE COURT: All right. I would like for you all to
21 submit, to talk further about timing, but it looks to me like
22 the plaintiffs' case is shorter than the defendants' case, and
23 we have not addressed the defendants' rebuttal case. Have you
24 thought about that, Mr. Hamilton, what your rebuttal case may
25 consist of?

1 MR. HAMILTON: I am, Your Honor. I think that --
2 obviously it will depend on -- we won't be able to make a final
3 decision until the end, but I would expect that it may be
4 Professor Rodden responding to whatever points were made in the
5 defendants' case, and then we may have a handful of delegates
6 to respond to statements made by intervenor's witnesses.

7 THE COURT: All right. Now, have you all -- in item
8 three, have you resolved the outstanding objections to
9 discovery designations, or will there actually be discovery
10 designations that we need to actually rule on?

11 MS. McKNIGHT: Your Honor, this is Kate McKnight for
12 the defendant intervenors. The Court required that we meet and
13 confer by yesterday, and we were able to do that with
14 plaintiffs' counsel. We were able to make progress,
15 significant progress, frankly, but I think there will remain
16 some objections to deposition designations.

17 THE COURT: All right. Somebody is in school or at
18 home.

19 MS. McKNIGHT: I'm sorry, Your Honor. You caught me
20 at my daughter's soccer practice.

21 THE COURT: I hope she's doing well. That's a risk I
22 take when I call quick conference calls, isn't it, Ms.
23 McKnight?

24 MS. McKNIGHT: Yes, 3:30 would have been a lot
25 quieter for me, but I wanted to make sure everybody was on, so

1 pardon me, Your Honor.

2 THE COURT: That's no problem. What I'd like for you
3 to do, then, is if you have -- you are continuing to work on
4 trying to resolve the objections; is that correct?

5 MS. McKNIGHT: That is correct. Frankly, we just
6 need to finalize an agreement I believe we came to last night
7 and yesterday, but that said, even if we come to agreement, I
8 think some objections will still remain for your consideration.

9 THE COURT: As to the ones that remain, bring to the
10 pretrial conference -- excuse me. Let me start again. When do
11 you think you'll identify what it is that's left to be dealt
12 with? When will you be finished with your process so you know
13 what we're going to have to confront?

14 MS. McKNIGHT: Your Honor, we will be filing briefs
15 on Monday. I believe your scheduling order requires -- the
16 objections have already been filed, and briefs will be filed on
17 Monday.

18 THE COURT: As to the remaining; is that right?

19 MS. McKNIGHT: That's correct, Your Honor.

20 THE COURT: When you file the briefs on Monday,
21 please attach to them -- and remember, you need to address --
22 take a copy to each judge's chambers -- a copy of the cover
23 page of the deposition so we know who the deponent is, then the
24 page or pages of the testimony that is being proffered, and
25 mark it, mark the page or pages with highlighting that

1 indicates the testimony being offered that is objected to, and
2 in the margin, just note the basis for the objection such as
3 401, 403, et cetera, so we are highlighted to get quickly back
4 to your brief on the topic. Do you all understand what I'm
5 trying to communicate?

6 MR. HAMILTON: Yes, Your Honor.

7 MS. McKNIGHT: Yes, Your Honor. Thank you.

8 THE COURT: Do you have other discovery designations
9 beyond depositions?

10 MS. McKNIGHT: There are a few, but we don't have any
11 objections pending towards those designations.

12 THE COURT: All right. What are miscellaneous trial
13 administrative issues? It's been my experience in the past
14 that those things strike like rattlesnakes out of the side of a
15 trail, and I'm particularly, and I know Judge Keenan and Judge
16 Allen are adverse to strikes of that sort. So what do you have
17 in mind by putting in that general term?

18 MR. HAMILTON: Your Honor --

19 MS. McKNIGHT: Your Honor, this is Kate McKnight for
20 defendant intervenors, and pardon me, Kevin, I don't mean to
21 interrupt you. I think, at least for the defendant
22 intervenor's part, we anticipated that that portion of the
23 agenda would cover items such as if we had any questions about
24 electronic use in the courtroom or types of copies, number of
25 copies you'd want. I expected that to be just fairly benign

1 questions about admin procedures with trial proceedings.

2 THE COURT: Mr. Hamilton, is that your view?

3 MR. HAMILTON: I have a more specific list that I can
4 read the list of issues that we intended to raise; number one,
5 whether we could do the technology walk-through in the
6 courtroom on Friday, October 6th. Monday immediately preceding
7 the trial is a holiday, so we were hoping that we would be able
8 to do the walk-through in the afternoon on Friday. We've been
9 speaking with Kathy Hancock.

10 THE COURT: The answer to that question is both sides
11 can do it. You don't want to do it on Monday, so you can do it
12 on Friday, October 6th, and you can do it at any time during
13 that day. And you work it out so -- are you going to have a
14 separate technology guru with you, Ms. McKnight, and the
15 defendants, or are we going to deal with only one guru or what?

16 MS. McKNIGHT: Yes, Your Honor, we will have a few
17 people with us who will be able to -- I think she would
18 appreciate the label of technology guru, but she will be with
19 us. She will be the one who will be working in the courtroom
20 to determine what technology is needed.

21 THE COURT: You don't think she would appreciate it
22 or she would appreciate it?

23 MS. McKNIGHT: I think she would appreciate it.

24 THE COURT: Okay, because I didn't want to insult
25 anybody.

1 MS. McKNIGHT: Not at all, Your Honor.

2 THE COURT: You all both work with Ms. Hancock. I
3 will reinforce with her that you will be doing that on
4 October 6th and that you'll get everything -- you can get your
5 equipment set up and leave it in there if you want to.

6 MR. HAMILTON: Your Honor, the next item on my list
7 was whether both sides would be allowed to store exhibits and
8 attorney working materials on Friday in the courtroom or if
9 there's a separate conference area for the parties available in
10 that way.

11 THE COURT: Each of you are going to be given a room,
12 and I, frankly, don't remember what I told Ms. Hancock about
13 what, but there is a working room that is sort of an attorney
14 conference room right off of the entrance to the courtroom, and
15 then there's another room just down the hall from the
16 elevators, and in the past, what the parties have done is kind
17 of assessed how many people they have, what they're going to
18 do, and decided on who needed which one based on their own
19 requirements.

20 You can put -- we've had people put copy machines in
21 there, and we've had people arrange to put telephones in there
22 and all kinds of different machines, things that will help you
23 with your case, but talk with Ms. Hancock about that and take a
24 look, and I don't see any reason why you can't bring your
25 exhibits in and have them ready. Is that what you want to do,

1 Mr. Hamilton, instead of having to do it on the morning of
2 trial?

3 MR. HAMILTON: That's exactly right, Your Honor.

4 THE COURT: I think that makes sense. So exhibits, I
5 don't know how many there are, but she'll work with you to work
6 something out. You all contact her, and I'll be in touch with
7 her about that.

8 MR. HAMILTON: Thank you, Your Honor. The next item
9 on my list was whether the parties would be allowed to have
10 lunch brought into the courtroom during the trial; for example,
11 preordering lunch and meeting somebody and being able to bring
12 in and eat lunch in the conference room.

13 THE COURT: You can eat in the conference room. If
14 you eat in the courtroom, Judge Hudson will shoot me.

15 MR. HAMILTON: We wouldn't want that, Your Honor.

16 THE COURT: You might not yet.

17 MR. HAMILTON: Do we need an order to allow those
18 lunches to be brought in?

19 THE COURT: I will attend to that.

20 MR. HAMILTON: Thank you, Your Honor.

21 THE COURT: You all know that you need to submit your
22 application to bring your electronics in by description, and
23 whatever you want to bring in, you tell me, work with Ms.
24 Hancock, get the form filled out, and I'll endorse it.

25 MR. HAMILTON: Thank you, Your Honor. That was my

1 next item. Then in the first trial in Alexandria, the Court
2 required the parties to buy bookshelves that were placed behind
3 each judge's area. Is there a similar request this time
4 around?

5 THE COURT: I don't know the answer to that. Let me
6 ask the judges and get back to you. What did you buy? Did you
7 buy it or rent it or what?

8 MR. HAMILTON: I believe we bought it, and we split
9 the costs with opposing counsel.

10 THE COURT: Do you still have them?

11 MR. HAMILTON: I don't think so, no. I think they
12 were from Costco. It wasn't a hugely expensive thing.

13 THE COURT: I'll let you know. I'll check with the
14 judges and be back in touch with you.

15 MR. HAMILTON: Thank you, Your Honor. Then the last
16 thing was whether we needed any kind of order or special
17 permission form to bring oversized poster boards into the
18 courtroom.

19 THE COURT: Not into the courtroom, but to get them
20 in the courthouse, just make a list of what you are bringing
21 and let me have it, and I'll attend to having -- if you'll work
22 with Ms. Hancock on that, and -- just get a list. You don't
23 need to bring them in here. Just bring a list of what they are
24 and describe them as oversized poster boards and there are six
25 of them or four or whatever, and she'll have a letter order

1 prepared to let them in without any fuss.

2 MR. HAMILTON: Perfect, Your Honor. Those are the
3 items that we had planned to raise under item number four on
4 the agenda.

5 THE COURT: This gives us a pretty good feel, and I'm
6 going to have this transcript prepared and given to Judge Allen
7 and Judge Keenan, and then we may have other items we may want
8 to talk with you about, but I'll get proposals for -- what I
9 started to say and I don't think I finished, as to item number
10 one, I'd like for you to sort of sort out how you think the
11 allocation of trial time ought to go.

12 I'm not quite so sure that 50/50 is the right way to
13 go and I don't think hard and fast rules and counting minutes,
14 but keeping time is going to be your responsibility with an
15 effort to try to keep things under control, but make specific
16 proposals and have them in our hands by Thursday, if you would,
17 as to what you think.

18 If you find some agreement, great. If you don't,
19 make your own proposals as to splitting of trial time, and then
20 we'll deal with them at the final pretrial conference. That
21 will be on the 29th, and I've issued an order saying what that
22 room is, et cetera. All right, is there anything else you all
23 need other than you want a copy of the transcript, I assume, of
24 this; do you not?

25 MS. McKNIGHT: Yes.

